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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EFRAIN LOPEZ CONSTANTINO,

Defendant and Appellant.

H023039

(Santa Cruz County

Super.Ct.No. F01231)

Defendant Efrain Lopez Constantino appeals from the judgment entered following his plea of guilty to one count of forcible lewd and lascivious conduct with a child under the age of 14. He was sentenced to state prison for six years and a restitution fine of \$1,200 was imposed. On appeal, defendant asserts, and the People concede, that the restitution fine was imposed in error.

Defendant was initially charged with three counts of forcible lewd conduct on a child under the age of 14, with special allegations of substantial sexual conduct and use of force, violence, duress, menace and fear. (Pen. Code, §§ 288, subd. (b)(1); 1203.066, subd. (a)(1) & (8).) He was sentenced pursuant to a negotiated plea bargain, but he was not advised that a restitution fine would be imposed pursuant to Penal Code section

1202.4 nor was he told that he could later withdraw his plea if the sentence imposed exceeded the terms of his plea bargain (Pen. Code, § 1192.5).¹

In *People v. Walker* (1991) 54 Cal.3d 1013, the Supreme Court held that a restitution fine generally must be included as part of a plea bargain, and that failure to do so precludes imposition of a fine that is a “ ‘significant’ ” deviation from the terms of the plea bargain at sentencing. (*Id.* at p. 1024.) The court further held that a defendant does not waive an objection to a restitution fine imposed in excess of the plea bargain by failing to raise the issue at sentencing unless the defendant was advised of his right to withdraw his plea pursuant to Penal Code section 1192.5. (*People v. Walker, supra*, 54 Cal.3d at p. 1024.) The court concluded that the appropriate appellate remedy in such a case is to reduce the fine to the statutory minimum since such a minimum fine is not significantly greater punishment than that bargained for and thus achieves substantial compliance with the plea bargain. (*Id.* at pp. 1027-1028.)

In this case, the People agree that the restitution fine of \$1,200, which exceeded the statutory minimum of \$200, cannot be deemed insignificant. Thus, they concede the restitution fine should be reduced to \$200. We agree.

DISPOSITION

The restitution fine of \$1,200 is stricken and the judgment is modified to reflect a restitution fine of \$200. As so modified, the judgment is affirmed.

¹ The People note that the notice of appeal specified an alleged error in imposing the middle term of imprisonment. However, the People also acknowledge that a difference between the issue specified in the notice of appeal and the actual issue raised on appeal does not render the notice of appeal defective or otherwise bar appellate review. (*People v. Jones* (1995) 10 Cal.4th 1102, 1109-1113.)

Wunderlich, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Rushing, J.